No. 557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE KROGER GROCERY & BAKING COMPANY ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The opposing brief (p. 2) attempts to avoid the constitutional questions presented by an obvious over-simplification of the issues. This is accomplished by ignoring in the restatement of the questions involved the omission of any allegation pertaining to time, place, circumstance or act, in an indictment which covers twenty-six years, the entire United States and all food for humans, livestock and poultry.

The "Questions" as set forth in the opposing brief would apply to every indictment, namely: Is it definite?

Does it allege jurisdiction? The true questions at bar go to an attempt to breach the bulwarks of human liberty and to make constitutional guarantees depend on discretionary Bills of Particulars. The real questions presented are well understood by the Government and are thus stated in the opposing brief (p. 8):

> "... there is also presented the question of whether an indictment, *lacking the particularity required by the Fifth and Sixth Amendments,* is invulnerable to demurrer and subject only to a motion for a bill of particulars." (Pet. 5, 6-11, 20-25.) (Italics ours.)

And in the opposing brief (p. 11) the Government proves that these are the questions by concluding:

> "If petitioners, *in order adequately to prepare their defense,* require further particulars, this is the function of a Bill of Particulars." (Italics ours.)

We contend that when the liberty of individual defendants is imperiled by indictment, the indictment must, under our Bill of Rights, contain at least enough information to enable such defendants "adequately to prepare their defense." Nor do these constitutional questions raise mere "issues of pleading" which may cause defendants "inconvenience" (opp. brief p. 10). This argument is answered by the words of this court in the *Glasser* case, quoted in the Petition (p. 71). If indictments of like scope in time, area and generality, are upheld, defendants will be put to a burden which Judge Phillips described as "beyond human comprehension." They must attend—hundreds of miles from their homes and their business—and remain through a trial which will obviously last for many months, at which trial they will learn for the first time the information without foreknowledge of which they cannot "adequately prepare their defense."

The opposing brief suggests that *only* at that "posture" of the case and *after* such protracted trial may this court consider whether defendants should have been tried at all or whether the trial should have been held in Kansas. We urge that the exceptional situation here presented and the vast scope of the indictment, necessitating a trial extending for months with the practical disruption of the third most important food business in America due to its management's absence more than a thousand miles from its office, demonstrates that review is required now!

Further, the fact that such lengthy trials in this and in other similar situations would, under the Government's contention, have to be *completed* before the questions at bar could be reviewed, shows the urgency and necessity of a review now for the guidance of the courts below, the District Attorney and Grand Juries considering similar indictments.

The fact that there are pending at the present time several indictments similarly defective, in which the Government claims that reliance should be had on a Bill of Particulars to supply constitutional defects in the indictments, further indicates that the questions are of general importance.

In the petition (pp. 25-26) we pointed out that the indictment in *United States* v. *New York Great Atlantic & Pacific Tea Company*, 137 F. (2d) 459 (C. C. A. 5), was *specific* as to certain *definite times—definite places*—and *definitely identified foods*. To say this fundamental difference between the *A. & P.* case and this case is "specious" (opp. brief, p. 10) is no answer.*

In the petition (pp. 22-24) we pointed out the error of the court below in misapplying the *Glasser* case. The oppos-

* The A. & P. indictment under IV, par. 14, covers specifically "coffee." Also par. 23, sub. par. c (10); V, par. 23c (7) and (8), cover entire crops of fresh fruits, vegetables and produce. Also par. 23c (9); V, par. 23a, sub. par. (2), covers price wars. Par. 23(b)(c) relates to brokerage; (f) to produce. VII, par. 26, relates to meat.

ing brief (p. 9) states that only Count Two, not Count One, of the indictment in that case was before the court. (315 U. S. 63.) This statement is correct but the fifty overt acts set out in Count One of the *Glasser* indictment (pp. 25-32, incl.) *are incorporated by reference into Count Two on page 56* of the indictment. Glasser did not contend that the indictment as a whole was indefinite—only that the "manner and means of effecting the object" of the conspiracy set forth in paragraphs 15 to 39 of the Glasser indictment were lacking in detail to inform him so he could prepare his defense. The language of this court with reference to a Bill of Particulars was *limited* to this contention.

The indictment in the present case as a whole is fatally defective for failure to identify any time, any place, any circumstance and any identifiable fact or act attributed to petitioners. For example, read the summary (pp. 5, 6) in the opposing brief. This summary is not of alleged "acts" but of alleged "terms" of the conspiracy. Read paragraphs "a" to "e" and ask as the alleged "terms" having to do with "competitors," "suppliers," "local areas," etc., are read—Where? When? Who? What? The answer is a *blank!* When we remember that there are *hundreds of thousands* of "independent retail grocers" of "competitors" of "local areas" of "retail" prices, of "suppliers" and of "food products," the *impossibility* of preparing a defense or in case of acquittal or conviction, pleading it in Bar is self-evident!

Finally, as to venue, the claim that this indictment fairly charges that the conspiracy was "formed" in Kansas is too tenuous to consider seriously. The defendants have never been in Kansas. The indictment does allege that the conspiracy was formed somewhere in the United States and concludes that it was "carried out in part" in Kansas. This conclusion standing alone can not support jurisdic-

tion for two reasons: first, to support jurisdiction in a district "outside the state and district wherein the crime shall have been committed," it must be alleged that some overt "act" was done pursuant to the criminal conspiracy in such District, and, second, in view of the period of *26 years* alleged as the period, it must further be alleged that such "overt" act was done within *three* years in order to come within the Statute of Limitations. To charge that "many" of the "acts" alleged in the indictment were done in Kansas, is to charge *nothing*, because no *"acts"* pursuant to the "conspiracy" are anywhere alleged in the indictment. For a description of the "acts"—many of which are alleged to have been done in Kansas—the Venue Section of the indictment (III) refers back to paragraph 26 of the indictment. When we examine paragraph 26 we find that it refers exclusively to the "terms" of the conspiracy and no "act" of any kind is alleged. Paragraph 29 particularizes (?) that Kroger *"advertised"* food products below cost, etc., but this charge as to advertising relates to something that is not even alleged as one of the terms of the conspiracy. In contradistinction, the indictment against The Great Atlantic & Pacific Tea Company alleged that advertisement and sale of *"meat"* below cost with intent to injure *"independent meat dealers"* in *Dallas, was an overt act in pursuance of the conspiracy.* The Kroger indictment merely generalizes as to unidentified "food and food products" being sold lower in Kansas than unidentified "similar" products were sold in unnamed "other locations." What "products"? What "other locations"? When? Where? No clue to the answer is contained in this indictment. Thus, an attempt is made to try defendants in the district and jurisdiction farthest removed from the *presumed* place (for none is alleged) where the conspiracy was formed (Cincinnati) without alleging a single overt act within the "terms" of the conspiracy, either in Kansas

or within the three year period of the Statute of Limitations.

We agree that the defendants may be tried in any district in which the conspiracy is formed, provided that the crime was committed within three years—but we deny that the indictment charges formation of the "conspiracy" in Kansas. We also agree that trial may be had in any district in which it was "carried out" but we deny that where a conspiracy between defendants was formed and the crime "completed" in *Cincinnati* defendants can be tried in *Kansas* without *"either allegation or proof of an overt act in furtherance thereof"* in Kansas as the opposing brief claims (p. 10).

The charge as to "advertising" is not only a departure from the conspiracy alleged but is so vague and indefinite that defendants cannot adequately prepare any defense thereto.

CONCLUSION

Two issues not heretofore determined by this Court are here squarely and timely presented.

1. Is an indictment which is constitutionally defective invulnerable to demurrer because the District Attorney can be required, if the Court in its discretion so orders, to supply information not found by the Grand Jury and without which defendants cannot adequately prepare their defense or avail themselves of the Constitutional immunity from double jeopardy?

2. Can defendants be tried in a district remote from the district and state where the conspiracy was formulated and the crime thus "completed" without alleging with required definiteness some overt act in said jurisdiction pursuant to the conspiracy within the statutory period of limitation?

These questions, we submit, are of paramount importance and of general concern. They should be answered before trial, not thereafter.

Respectfully submitted,

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